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Date: May 24, 2010

By /Marvette Ferguson/
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Attorney Docket No. 101769-254

Confirmation No. 8156

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANTS : Ralf SCHLIEPHACKE et al.
SERIAL NO. : 10/830,172
CUSTOMER NO. : 27384
FILED : April 21, 2004
FOR : METHOD FOR DIECUTTING A WEB WHICH IS PROVIDED
WITH ADHESIVE AT LEAST ON ONE SIDE AND IS ON A
BACKING MATERIAL INTO INDIVIDUAL DIECUTS
ART UNIT : 1791
EXAMINER : James Sells

May 24, 2010

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Commissioner for Patents
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Alexandria, VA 22313-1450

APPELLANTS' BRIEF ON APPEAL PURSUANT TO 37 CFR § 41.37

SIR:

This is an appeal from the final rejection of claims 1-6.

(1) REAL PARTY IN INTEREST

The real party in interest is tesa aktiengesellschaft by virtue of an assignment recorded in the United States Patent and Trademark Office on August 13, 2004, at Reel 015089, Frame 0864.

(2) RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences.

(3) STATUS OF CLAIMS

Claims 1-6 are pending and finally rejected. The application was originally filed with claims 1-5. The amendment dated February 24, 2009, added claim 6. This appeal is taken as to all of the rejected claims.

(4) STATUS OF AMENDMENTS

There have not been any amendments filed since the final rejection.

(5) SUMMARY OF THE CLAIMED SUBJECT MATTER

There is a single independent claim, viz., claim 1, which relates to a method for diecutting a web into individual diecuts. As discussed in the instant specification at page 1, lines 27, through page 2, line 2, “[t]hese diecuts are individual portions of adhesive tape,” which can then be used to bond certain parts, for example, electronic components or seals in mobile phones. These individual diecuts are cut from a “mother” adhesive tape, called “the web,” in what is known as “the kiss-cut process.”

As discussed in the instant specification at page 2, lines 19-31:

“Production takes place for example by a web which is on a backing paper and may comprise a single layer of adhesive or a substrate which is provided with an adhesive at least on one side being diecut into individual diecuts, but without cutting through the backing paper.

“The cross-diecuttings of such webs are carried out with straight cross-cutting lines. Furthermore, the crosscutting blade is arranged exactly at 90° in relation to the direction of the machine. This is shown by Figure 1. The web is divided in the direction of the machine (see arrow) into individual diecuts **50**, the line of the cross-diecutting **60** being aligned at an angle of 90° in relation to the direction of the web or machine.”

Whereas the prior art method involves cross-diecutting along a diecutting line **60**, which is *straight*, the method of instant claim 1 requires that the diecutting line be a non-branching line having a form *other than a straight line*.

In particular, instant claim 1 requires cross-diecutting along a diecutting line subdividing the web into diecuts over an entire width of the web, wherein the diecutting line is a non-branching line having a form other than that of a straight line, and wherein during the cross-diecutting the backing material is not cut into, or is cut into only insignificantly. These requirements are fully supported by the instant specification at page 6, lines 13-20.

Referring to the drawings, Figure 4 is most illustrative of the differences between the known processes and the instantly claimed process. Figure 4 shows a comparison of the known kiss-cut process (top half of drawing) and the inventive process (bottom half of the drawing). In both portions of the drawing, a web is kiss-cut into three complete individual diecuts **42**. In the top half of the drawing, this is by virtue of cross-diecutting along *straight* line **60**, and this leads

to individual diecuts with *straight* edges. In contrast, in the bottom half of the drawing, the individual diecuts are made by cross-diecutting along *non-straight* line **60**, and this leads to individual diecuts with at least two *non-straight* edges.

(6) GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

The grounds of rejection to be reviewed on this appeal are:

- A. The final rejection of claims 1-4 under 35 USC § 103(a) as being obvious over Khatib, US 5,370,420, in view of Treleaven, US 6,413,345;
- B. The final rejection of claim 5 under 35 USC § 103(a) as being obvious over Khatib in view of Treleaven and further in view of Bausewein et al. (“Bausewein”), US 5,482,779; and
- C. The final rejection of claim 6 under 35 USC § 103(a) as being obvious over Khatib in view of Treleaven and further in view of Scholz et al. (“Scholz”), US 2002/0041945.

(7) ARGUMENT

A. The Rejection of Claims 1-4 under 35 USC § 103(a) as Being Obvious over Khatib in view of Treleaven

I. The combination of Khatib and Treleaven does not make out a *prima facie* case of obviousness.

Main claim 1 requires, among other things:

- 1) cross-diecutting along a diecutting line;
- 2) the diecutting line subdividing the web into individual the diecuts over an entire width of the web; and
- 3) the diecutting line being a non-branching line having a form ***other than that of a straight line.***

The Examiner concedes that Khatib does not disclose the diecut configuration required by the instant claims. See the final rejection, page 3, first paragraph.

In order to bridge this gap between Khatib and the instant claims, the Examiner relies on Treleaven, which the Examiner says shows a saw-toothed diecutted tear line in Figure 2. See the final rejection, page 3, second paragraph.

The Examiner says that it would have been obvious to employ a saw-tooth diecut pattern, as taught by Treleaven, in the labels of Khatib, “as a matter of choice based on desired physical properties (i.e., ease and effectiveness of use by the consumer) and functionality of the labels being produced.” See final rejection, page 3, third paragraph.

Appellants respectfully submit that the combination of Khatib and Treleaven does not make out a *prima facie* case of obviousness for at least two reasons. First, Treleaven’s saw-tooth diecut pattern is not on an edge of an individual diecut. Accordingly, if persons skilled in the art were to employ such feature in Khatib’s labels, the result would not involve a kiss cut operation, as instantly claimed, where the diecutting line subdivides the web into individual diecuts over an entire width of the web. Instead, Treleaven’s suggestion is to provide a tear strip on an interior portion of an individual label, and, therefore, if employed in Khatib, would not serve to subdivide Khatib’s web into individual diecuts, as required by the instant claims.

Second, there is no practical reason, and the Examiner has not articulated any, why persons skilled in the art would have been motivated to provide Khatib’s labels with a saw-tooth

diecut pattern *on an edge*. The mere fact that a saw-tooth diecut pattern was known in the prior art is not, in and of itself, a reason for employing it in Khatib's labels. Nor is the fact that Treleaven provides a saw-tooth pattern on a tear strip *in an interior* of an individual label any reason to provide a saw-tooth pattern *on an edge* of an individual diecut. The Examiner does not point to any advantage of such a pattern over a straight-line die-cut *in the context of diecuts made by a kiss-cut operation*, or to anything else practical that could have been said to have motivated persons skilled in the art actually to make such a substitution. Unless the person skilled in the art wants to provide Khatib's diecuts with an interior tear strip, Treleaven offer's no guidance or hint of any advantage for providing an edge of Khatib's diecuts with a saw-tooth pattern. In the absence of such evidence of motivation, Appellants submit that the combination of Khatib and Treleaven does not make out a *prima facie* case of obviousness.

At best, all the Examiner has done is to show that a pattern fitting Appellants' non-straight line requirement was known in the prior art. However, Appellants do not claim to have invented this particular pattern, but, instead, to have found this pattern and others to have practical advantages in the context of a kiss-cut operation, wherein the pattern is employed for a diecutting line that subdivides the web into individual diecuts over an entire width of the web. In spite of the fact that Appellants have repeatedly argued that the rejection is not properly supported, the Examiner has failed to provide any practical reason why a person having ordinary skill in the art actually would have been motivated to use a saw-tooth diecut pattern in Khatib's labels. As reaffirmed by the Court in *In re Regel et al.*, 188 USPQ 136, 139, footnote 5 (CCPA 1975):

“The mere fact that it is *possible* to find two isolated disclosures which might be combined in such a way to produce a new

compound does not necessarily render such production obvious unless the art also contains something to suggest the desirability of the proposed combination.”

The present rejection is devoid of anything suggesting the desirability of the proposed combination. Merely showing saw-tooth edges were known in the prior art for internal tear strips, and, therefore, could be selected if one wanted to use that design, is not sufficient to establish a desirability to substitute in the context of a kiss-cut operation one design (saw-tooth cut) for another (straight-line) or, therefore, to evidence the practical motivation of one of ordinary skill in the art actually to make the substitution.

As set forth in *In re Gyurik et al.*, 201 USPQ 552, 557 (CCPA 1979), discussing obviousness applied to chemical compounds, which standard also applies here:

“An element in determining obviousness of a new chemical compound is the motivation of one having ordinary skill in the art to make it. That motivation is not abstract, but practical, and is always related to the properties or uses one skilled in the art would expect the compound to have, if made.”

The Examiner here only gives abstract, design hypotheses for why persons skilled in the art would have been motivated to employ a saw-tooth diecut in Khatib’s labels. No practical motivation is ever advanced. Also, such design, even if employed in Khatib’s diecut labels, in the same manner that Treleaven employs the design, i.e., in an internal tear strip, would not be at an edge or subdivide the web into individual diecuts over an entire width of the web, as required by the instant claims. Moreover, such saw-tooth design, if employed, is not established on this record to have any practical advantage in the context of Khatib’s diecut labels. Consequently, persons skilled in the art would have had insufficient motivation to make the modification the

Examiner proposes and even if they did, such proposed modification would not meet the terms of the instant claims. Accordingly, either way, the cited combination of references does not make out a *prima facie* case of the obviousness of the instant claims.

II. THE RECORD REFLECTS UNEXPECTED RESULTS ATTRIBUTABLE TO THE NON-STRAIGHT LINE CROSS-DIECUTTING LIMITATION AND, THEREFORE, ANY *PRIMA FACIE* CASE OF OBVIOUSNESS MADE OUT BY KHATIB AND TRELEAVEN IS REBUTTED.

Assuming for the sake of argument that a *prima facie* case of obviousness has been made out, then Appellants point out that the specification contains comparative data proving an unexpected result, which data are, therefore, objective evidence of nonobviousness. The Examiner commits error in failing to give this evidence the proper weight and in failing to find this evidence overcomes any *prima facie* case of obviousness made out by Khatib and Treleaven.

In this regard, Appellants would call the attention of the Honorable Board to the Example, which begins on page 23 of the specification, especially to the discussion at page 25, lines 10-30:

“In the comparative test with straight cross-diecutting, *a maximum application rate of 0.3 m/s is obtained* when dispensing the diecuts with a device as explained above.

“In the case of the undular cross-diecutting according to the invention, *a maximum application rate of 2.0 m/s is obtained.*

“The comparison shows that ‘non-straight’ cross-diecutting forms *permit a faster application* of the diecuts in contrast to a straight form of the diecutting line.

“The non-straight diecutting line geometry has the effect that greater cohesive forces are produced than in the case of a straight diecutting line.

“The holding forces between the two diecuts are produced by the flow properties of the adhesive at the cut edge after the cross-diecutting. The longer the cut edge, the more flowing adhesive that bonds again after the cut. The greater, therefore, are the cohesive forces between the diecuts.

“The greater, in turn, the cohesive forces between the individual diecuts, the faster the adhesive-tape diecuts can be applied.
[Emphasis added.]”

Simply put, the requirement of the instant claims that the diecutting line is a non-branching line having a form other than that of a straight line is much more than a simple design choice, as the Examiner alleges. The use of the inventive form has the surprising and demonstrated effect of *increasing the speed* with which the diecuts can be dispensed from a dispensing device. As taught at page 25, lines 10-12, straight-line diecuts can be dispensed from a device at a maximum rate of *0.3 m/s*. In contrast, as taught at page 25, lines 13-15, a corresponding undular diecut can be dispensed from the same device at a much higher maximum rate of *2.0 m/s*. That’s nearly *7 times* faster. Speed of application is, of course, an important parameter in practice. Accordingly, the difference shown is of great practical effect. There is absolutely nothing in the combination of Khatib and Treleven that teaches or suggests that use of an undular diecut form as opposed to a straight-line diecut form should increase the speed of application of the diecuts. Yet, this is exactly what the data in the instant specification prove

happens. Further, the explanation at page 25, lines 16-30, provides a reasonable basis for concluding that the data are representative of the full breadth of the claims. Indeed, the specification teaches at page 25, lines 16-18, that “[t]he comparison shows that ‘non-straight’ cross-diecutting forms permit a faster application of the diecuts in contrast to a straight form of the diecutting line.” Again, the combination of Khatib and Treleven is completely silent as to such a benefit. Accordingly, the data in the specification must be considered to be surprising, and, thus, unexpected, and, therefore, as objective evidence of the nonobviousness of the instant claims. Although these data are not in declaration form, consistent with the rule that *all* evidence of nonobviousness must be considered when assessing patentability, the Examiner was required to consider the data in the specification in determining whether the claimed invention provided unexpected results. *In re Soni*, 34 USPQ2d 1684, 1687 (Fed. Cir. 1995).

The Examiner previously conceded that the data demonstrated a surprising and unexpected result. See the first full paragraph on page 4 of the first final rejection dated August 23, 2006. There the Examiner stated “Applicant argues the invention has the surprising effect of increasing the speed with which diecuts can be applied. *This may be true.* [Emphasis added.]”

However, rather than find this evidence probative of patentability, the Examiner entrenched under a per se application of a legal theory, allegedly supported by *Ex parte Obiaya*, 227 USPQ 58, 60 (BPAI 1985), that “the fact that applicant has recognized another advantage which would flow naturally from following the suggestion of the prior art cannot be the basis for patentability when the differences would otherwise be obvious.” See the first paragraph on page 4 of the final rejection dated September 6, 2007.

The Examiner has since that time been entrenched in and unmovable from his position.

Appellants respectfully submit that the Examiner commits a number of errors:

1. The Examiner errs in failing to acknowledge the unexpected results demonstrated by the data in the instant specification.

The present invention relates generally to a process whereby a substrate is diecut into multiple individual diecut pieces. In the prior art, this diecutting typically occurred along a *straight* line. The method of instant claim 1 specifically requires that the diecutting line is “a nonbranching line having a form *other than* that of a straight line.”

When the resulting diecuts are dispensed from a device, for example, the dispensing device shown in Figure 7, Appellants have demonstrated that diecuts cut with a non-straight line offer an unexpected advantage in terms of the speed with which they can be dispensed. As discussed in the instant specification at page 10, lines 25 ff, the maximum rate that diecuts cut with a *straight* line can be dispensed is *0.3 m/s*. In contrast, the maximum rate that diecuts cut with a *non-straight* line can be dispensed is unexpectedly much greater, i.e., *2.0 m/s—nearly 7 times faster!*

There is nothing in the cited combinations of references that teaches or suggests that the nature of the diecutting line is a result-effective variable affecting the dispensing rate of the resulting diecuts.

There is also nothing in the cited combination of references that teaches or suggests that a non-straight diecutting line should produce diecuts that can be dispensed at a much faster rate than diecuts produced by a straight diecutting line.

Consequently, either way, the data in the instant specification evidence an unexpected result, which is objective evidence of nonobviousness.

The Examiner errs in failing to acknowledge these unexpected results.

2. The Examiner errs in finding that the unexpected results are taught in the prior art, specifically, Scholz, US 2002/0041945.

The Examiner relies on Scholz's paragraph [0056] to teach "[f]eeding/dispensing diecut materials at a rate in the range recited in applicant's claims is known in the prior art * * *.

Therefore applicant's argument is not persuasive in this instance." See the first paragraph on page 6 of the final rejection.

However, Appellants respectfully point out that Scholz's paragraph [0056] mentions his constructs "are capable of being converted by *diecutting* and *matrix-stripping* at high speeds, e.g., at web speeds of about 0.75 m/s (150 feet per minute), and in some cases up to about 1.5 m/s (300 feet per minute)." "Diecutting" refers to the process of cutting the diecuts into the substrate. "Matrix-stripping"¹ refers to the removal of extraneous material from around the cut diecuts after the diecutting is done. Accordingly, nowhere does Scholz discuss the result that Appellants claim to be unexpected, i.e., *the improved speed of dispensing the diecuts from a dispensing device*, for example, as shown in Figure 7.

In fact, Scholz nowhere mentions dispensing at all. Accordingly, the Examiner's conclusion that "[f]eeding/dispensing diecut materials" is known from Scholz is misleading and wrong.

Further, Scholz's general statements are irrelevant in any event in the face of the actual comparison data. Once again, the instant data show that a maximum dispensing speed of 0.3 m/s

¹ Further information on the overall matrix-stripping process can be found in Reed, US 4,246,058, if desired.

is obtainable with straight line produced diecuts, whereas 2.0 m/s is obtainable with non-straight line produced diecuts. Nothing in Scholz teaches or suggests this difference in results. There is no reason, even given Scholz's general statements, to expect that it should be possible to dispense diecuts produced by diecutting along a non-straight diecutting line significantly faster than to dispense diecuts produced by diecutting along a straight diecutting line. Accordingly, the instant comparative data must still be regarded as surprising and, therefore, unexpected, even in view of Scholz's general statements, and, further, as objective evidence of nonobviousness.

The Examiner errs in not acknowledging the demonstrated results to be unexpected in view of the cited prior art.

3. The Examiner errs in refusing to allow the claims because the unexpected results are not recited in the claims themselves.

The Examiner has consistently refused to issue the instant claims at least in part because the unexpected results are not recited in the instant claims. Appellants have consistently directed the Examiner to the decision in *In re Merchant*, 197 USPQ 785, 788 (CCPA), for the proposition that the claims need *not* recite the unexpected results of a process so long as the structural features responsible for the unexpected results are recited in the claim. See, for example, pages 6 and 7 of the amendment filed February 24, 2009.

In the second paragraph on page 6, the Examiner attempts, but utterly fails to distinguish the *Merchant* decision. First, the Examiner says that "all of the method steps applicant alleges produce unexpected results are known in the prior art." This position is untenable. A *prima facie* case of obviousness could not exist in the first place were not all the steps of a claimed method taught or suggested by the prior art. And, the fact that they may all be in the prior art is

no reason to ignore and/or fail to give proper weight to comparison data that rebuts the presumption of obviousness.

The fact of the matter is that even if all of the steps were known in the prior art—which Appellants do not concede—they have not been combined in the prior art in the manner that Appellants claim. Thus, the rejection is one for obviousness, not anticipation. Moreover, the Examiner has not shown there to be any expectation in the art of the improvement that Appellants have demonstrated. So, at best, the Examiner has established a *prima facie* case of obviousness based on a *hypothetical* combination of known steps, which *prima facie* case of obviousness has been rebutted by comparison data showing an unexpected result obtained when the steps were combined *in actuality*.

And, to the extent the Examiner would have Appellants compare against his cited combination of Khatib and Treleaven, it is well-settled that an applicant cannot be required to compare the claimed invention *against itself*. See, for example, *In re Chapman*, 357 F.2d 418, 422 (CCPA 1966):

“We do not agree with the board that a high molecular weight polyethylene of [the secondary reference] Hoerger should have been substituted for the polyethylene of [the primary reference] Noeske if comparative data are to be presented *for this, we think, would amount to requiring comparison of the results of the invention with the results of the invention.* Nor can we agree that appellants’ compositions are unpatentable because such a process ‘would inherently yield’ a product substantially the same as that claimed, since that position implies that any and all products of obvious processes are unpatentable by reason of their being the ‘inherent’ results of those processes (again, emphasis added).”

See, also, the recent decision of the Board of Patent Appeals and Interferences in *Ex parte Hirata et al.*, 2009 WL 2142960 (BPAI 2009). Applicant therein attempted to show the unexpected benefit of the invention claimed therein over an embodiment of the closest prior art reference. The examiner therein criticized the showing, the Board noting the following:

“The Examiner only asserts that this showing is not sufficient since it is not directed to ***a comparison between the claimed invention and the invention suggested by the combined teachings of the prior art references***. However, we know of no legal precedent for such a requirement. ***Appellants cannot be required to compare the invention against itself*** (emphasis added).”

The Examiner concedes Khatib does not show a diecut having a non-straight line edge. Accordingly, the proper comparison is with a diecut having Khatib’s straight-line edge. Treleven does not teach or suggest that the incorporation of a non-straight line edge in Khatib’s diecuts should increase the dispensing speed of such diecuts from a dispenser. Yet, exactly this unexpected improvement is shown in the data in the instant specification. Appellants respectfully submit that such data proves an unexpected result, which is, thus, objective evidence of nonobviousness.

Second, the Examiner says “the specific results applicant alleges are unexpected are also known to the prior art (see Scholz as described above).” As noted above, Scholz refers to diecutting and matrix-stripping speeds, not to the speed of dispensing from a dispensing device, which is the improvement demonstrated in the instant application.

The Examiner errs in continuing to ignore *Merchant* and to find it inapplicable to the instant fact situation.

B. Rejection of claim 5 under 35 USC § 103(a) as being obvious over Khatib in view of Treleaven and further in view of Bausewein.

The rejection of claim 5 suffers the same defects as the rejection of claims 1-4 over Khatib in view of Treleaven. Although the Examiner relies on Bausewein, Bausewein is relied on only to teach coating on both sides of the carrier. Bausewein does not, therefore, overcome the basic failure of Khatib and Treleaven to teach or suggest diecutting along a diecut line having a form other than a straight line, as required by claim 1; or the unexpected improvement in dispensing properties as proven by the example in the instant specification. Consequently, either way, claim 5 is not obvious over Khatib in view of Treleaven further in view of Bausewein.

C. Rejection of claim 6 under 35 USC § 103(a) as being obvious over Khatib in view of Treleaven and further in view of Scholz.

The rejection of claim 6 suffers the same defects as the rejection of claims 1-4 over Khatib in view of Treleaven. Although the Examiner relies on Scholz, Scholz is relied on only to teach “feeding diecut materials” (see the third paragraph under point 4 on page 5 of the final rejection). Scholz does not, therefore, overcome the basic failure of Khatib and Treleaven to teach or suggest diecutting along a diecut line having a form other than a straight line, as required by claim 1; or the unexpected improvement in dispensing properties as proven by the example in the instant specification. Consequently, either way, claim 6 is not obvious over Khatib in view of Treleaven further in view of Scholz.

As discussed above, the Examiner misleads when he refers to Scholz as teaching “feeding/dispensing.” Scholz does not, in fact, teach dispensing matrix materials that have, in fact, been diecut. Further, Scholz does not, in fact, teach or suggest any advantage is gained by the choice of diecutting line form in the context of dispensing diecut matrix materials from a dispensing device.

In view of the foregoing, Appellants respectfully request that the Honorable Board reverse the final rejections.

AUTHORIZATION TO CHARGE FILING FEE TO DEPOSIT ACCOUNT

It is requested that the fee for the filing of the Brief on Appeal be charged to the undersigned's Deposit Account No. 14-1263 in the amount of \$540.00 for other than a small entity.

CONDITIONAL PETITION FOR EXTENSION OF TIME

If any extension of time for this response is required, appellant requests that this be considered a petition therefor. Please charge the required Petition fee to Deposit Account No. 14-1263.

ADDITIONAL FEE

Please charge any insufficiency of fees, or credit any excess to our Deposit Account No. 14-1263.

Respectfully submitted,

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(8) CLAIMS APPENDIX

1. (Original) Method for diecutting a web into individual diecuts, said web being provided with adhesive at least on one side thereof and being on a backing material, said method comprising cross-diecutting along a diecutting line subdividing the web into the diecuts over an entire width of the web, said diecutting line being a non-branching line having a form other than that of a straight line, wherein during the cross-diecutting the backing material is not cut into, or is cut into only insignificantly.
2. (Original) Method according to Claim 1, wherein the cross-diecutting has an angle of substantially 90° in relation to the direction of the web.
3. (Original) Method according to Claim 1, wherein the diecutting line is arcuate, undular, sawtooth-like and/or zigzag-formed.
4. (Original) Method according to Claim 1, wherein the web comprises a layer of adhesive or a substrate which is provided with an adhesive on one or both sides.
5. (Original) Method according to Claim 1, wherein anti-adhesive coatings have been applied to both sides of the backing material, the two anti-adhesive coatings not differing substantially in the degree to which they repel the same layer of adhesive.

6. (Previously Presented) Method according to Claim 1, which further comprises dispensing the individual diecuts with a dispenser at a rate greater than 0.3 m/s to a maximum of 2.0 m/s.

(9) EVIDENCE APPENDIX

NONE.

Appellants rely on the data in the instant specification on pages 25-26; and in Figure 4.

(10) RELATED PROCEEDINGS APPENDIX

NONE